

University of Miami Law Review

Volume 31
Number 4 1976 *Developments in Florida Law*

Article 14

9-1-1977

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Recommended Citation

The Honorable David U. Strawn, *Penal Reform*, 31 U. Miami L. Rev. 1159 (1977)
Available at: <https://repository.law.miami.edu/umlr/vol31/iss4/14>

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PENAL REFORM

THE HONORABLE DAVID U. STRAWN*

This article examines aspects of penal reform within our present criminal justice system. The author advocates application of a systems analysis approach to penal problems in order to provide predictive knowledge concerning effects that arise when changes or reforms are made within the penal system. He also suggests certain practical improvements that can be made in the present system and proposes that an agency be established by the Florida legislature to study the criminal justice system.

Those who address the subject of penal reform are frustrated, on the one hand, by the varieties of recommended reform and, on the other, by the apparent complacency of the corrections bureaucracy. It seems that while critics of the present criminal justice system vigorously advocate or condemn rehabilitation, deterrence, punishment or banishment, there occur few changes within the system, and problems continue to grow. This article proposes that a systems analysis approach be adopted for the study of the criminal justice apparatus. By using such an approach to examine prison populations, how they are selected, and related social goals, debate and action on penal reform can become better focused, and therefore more effective.

Most reformers make an assumption that prison populations are homogenous. Yet it appears to even a casual observer that an unemployed fifty year old burglar with three convictions will respond differently to his penal experience than a man who murdered his wife's lover. Treatment of one will undoubtedly fail when applied to the other. Likewise, the concept of special treatment for first offenders runs afoul of the fact that most murderers are first offenders. To make the situation more difficult, prevailing social attitudes toward the potential for rehabilitation of criminals cannot be empirically verified. Does rehabilitation work? Florida provides no proof. Only recently the legislature required corrections officials to accumulate data on recidivism in order to measure effectiveness of penal programs in preventing repeated offenses.

A profile of the prison population is clearly a first step in evalu-

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ating proposals for reform. Understanding who is likely to become an inmate is essential to predicting what treatment will be appropriate. If the effectiveness of rehabilitation, deterrence or banishment is measured with respect to those actually in prison, decisions on who ought to go to prison can be made more intelligently.

Realistic perception of the issues in penal reform is almost impossible without recognizing the divided decisionmaking regarding who enters Florida's inmate population. Consider the steps: (1) the legislature defines a "crime"; (2) the crime may or may not be committed; (3) the victim may or may not complain; (4) the police may or may not arrest; (5) the prosecutor may or may not charge; (6) the defendant may plead, not plead, or plea-bargain; (7) the jury or judge may convict or acquit; (8) the judge may incarcerate or not; and (9) the Parole and Probation Commission decides how long the inmate remains incarcerated. It is apparent that the "upstream" decisions of legislators, victims, police, lawyers, and judges cannot be isolated from "penal" decisions; all of the prior steps must be considered in an analysis of the later ones.

Plea-bargaining illustrates how a decision at one stage can affect results in others. If plea-bargaining were abolished or severely restricted, prosecutors would modify their practices. In effect, they would quite likely do their bargaining before the decision to prosecute, and fewer prosecutions would be filed, most likely only those perceived as highly proveable. The conviction rate would probably increase, and judges would feel more confident about their sentences, possibly imposing longer terms. Thus, abolition of plea-bargaining could shift prison populations even more away from the "rehabilitable," and would require extensive facilities for holding ever more difficult prisoners for longer terms.

But penal decisions are being made by "downstream" officials who lack special training and are not as responsive to the electorate as those in the earlier decisionmaking stages. At present, the problem of reducing sentence disparity is in the hands of judges, who are thus forced to make decisions more appropriate for the people's representatives in the legislature. Florida's judges are not necessarily representative of their communities, are largely inaccessible to the voters, and do not provide an open forum for determining sentencing policies. There is nothing in their training to qualify judges for the particular sentencing decisions they make; and what they learn by experience does not readily disseminate to their peers or to the legislature. Yet as long as the legislature is inactive, trial judges

must continue to make the sentencing decisions which determine who enters the prison population. This fact will continue to affect the success of prison programs as well as the effectiveness of deterrence based on an equal application of justice.

Merely to state the possible social policies that are affected or accomplished by a penal program is to make evident that there must be agreement in priorities before there can be consistency at any practical level. Illustrative objectives of penal reform are: (1) reduced expense; (2) preservation of constitutional rights; (3) improved public safety and security; (4) avoidance of the hardening of criminal attitudes by incarceration; (5) rehabilitation of those most likely to benefit; (6) effective deterrence where possible, and so forth. At present, some of these objectives are being pursued at cross-purposes. For example, the purpose of rehabilitation is being thwarted by the policy of banishment implicit in choices by judges and juries to imprison those most feared by the community. Such persons in effect have never been "habilitated" and thus are the worst prospects for any form of rehabilitation. The failure of across-the-board rehabilitation under these circumstances is not surprising, but conclusions concerning the probability of success of rehabilitation should not be drawn until these conflicting purposes have been eliminated or reconciled.

The multiplicity of participants, procedures and objectives involved in the penal process make it imperative that a comprehensive means be found to analyze the entire apparatus and to provide data on the significance of each factor within the apparatus. Such a means presently exists. The social sciences are developing deductive mathematical computer models of institutional systems which can be used to understand relationships within a governmental apparatus and to anticipate the effect of a change in one area on an entire system.¹ Such models, if applied to penal reform,² could be used to predict the most likely outcomes of proposed changes to our methods of addressing crime. For instance, a prediction might be made on the effect of changing the plea bargaining process in order

1. See M. GREENBERGER, *MODELS IN THE POLICY PROCESS* (1966); J. HILL & A. KERBER, *MODELS, METHODS, AND ANALYTICAL PROCEDURES IN EDUCATION RESEARCH* (1967); A. KAPLAN, *THE CONDUCT OF INQUIRY* (1964).

2. S. NAGEL, *MODELING THE CRIMINAL JUSTICE SYSTEM* (In press 1977). See generally Nagel, *A Conceptual Scheme of the Judicial Process*, *AM. BEHAVIORAL SCIENTIST*, Dec., 1963, at 7-8.

to achieve the best balance of desirable effects socially and economically. Similarly, a computer model, continually updated by new data, could be employed to study the effects of changes in mandatory sentencing.

There is only one arm of government with the capacity to develop such a system. The judiciary lacks the power to appropriate the money, the executive branch is similarly constrained, and there are political limitations on the creation of another bureaucracy. Since the power is in the legislature to make the necessary laws for penal reform the legislature is the logical body to control the means available to monitor and examine in detail both the present corrections systems and any future systems.

Toward this end, it is proposed that the legislature create an agency, responsible to a legislative committee, with the following objectives: (1) to centralize and control data gathering concerning the criminal justice system; (2) to establish goals for the criminal justice system; (3) to study existing resources which are adaptable to these goals; (4) to initiate projects to provide the behavioral analysis necessary to formulate new programs; (5) to create computer models to aid in predicting the effectiveness of legislation; and (6) to monitor the criminal justice system continuously and recommend adjustments. This last purpose reflects an awareness that there is no single static solution to any social problem. As society changes, so must its institutions; we should become accustomed to the lack of finality and the need continually to adapt.

Having in mind the dynamic nature of the penal process, the Corrections Committee of the Florida Bar has approved in principle a number of the following proposals, which are offered as examples of the kind of thinking adaptable to a total systems analysis.

We must consider the effects of disseminating information about lawbreaking and the effects of idealization of lawbreaking on both the young, in terms of their altered moral values, and on the adult population, in terms of their more realistic attitude toward law enforcement. Public attitudes are ultimately reflected in the decisions of jurors, to whom a prosecutor should be able to present meaningfully the significance of the crime allegedly committed. Crime victims need to be encouraged to report and prosecute crimes; a strong incentive would be some form of compensation for victims.

Procedures at the pretrial stage ought to be adapted to facilitate rapid decisions on charging and bonding. Equipped with relia-

ble predictive information from behavioral analysis, officials would be able to estimate bonding requirements and the likelihood of persons coming to trial without committing another crime. Public awareness of valid information about the costs and necessity for imprisonment until trial could remove public pressure from judges who would then be able more easily to determine the appropriateness of pre-trial release.

In order to restore integrity to the criminal justice system, plea and sentence bargaining should be studied with the object of eliminating both. "Negotiable" justice encourages disrespect; it permits the offender to determine the course of his crime and then the course of the social response. If the prosecutor decides to charge, he should be required to try the case unless a conviction is impossible or the defendant pleads guilty as charged. On the other hand, discretion to grant probation in lieu of filing charges should be given to prosecutors to relieve the pressures created by diminished plea bargaining. Such a system could avoid the present anomalous and burdensome routine of holding hearings on perfunctory pleas of guilty, with adjudication being withheld in order to grant probation.

Mandatory minimum sentencing laws should be enacted. To frame such laws requires voluminous accurate, detailed information on the frequency of commission of classes of crimes, the relative criteria of wrongdoing involved (e.g., use of a firearm), and the effectiveness of alternative penal dispositions. Information of this type might be manageable only by means of computer models; indeed only such hard data should be acceptable in debating sentencing reform. Feedback from continuous data gathering would be essential to evaluation of legislative decisions and revisions. Judges alone are not equipped to make such decisions, and they should be relieved of the sole responsibility for making them.

A primary effect of mandatory sentencing would be a more predictable inmate population. Rehabilitation could be focused on persons for whom data showed it would be effective, and abandoned or made elective elsewhere. Banishment as an alternative would also have its place, for those who did not wish rehabilitation or for those whom it would not help, as determined by realistic information. Another effect of mandatory sentencing would be the modification of the Parole and Probation Commission's presently unappealable power to amend sentencing decisions. Prosecutors, judges and inmates would have the assurance presently lacking that conviction will always result in certain punishment. It seems unlikely that any

system can deter crime unless the prospect of detection, prosecution and imprisonment is highly predictable.

The larger purpose of a legislative agency for ongoing penal reform would be to enlarge the awareness of the citizen, lawyer and judge concerning the techniques and policies of law enforcement at all levels because each level is connected to all others. No one agency of the executive or judicial branches should be given the responsibility for the success or failure of the entire apparatus. Only the representative arm of our government can aid every involved agency in meaningful ways.

The cause of our current apparatus breakdown appears to be a low degree of social effort toward inculcating guilt feelings over the commission of wrongful acts, the lack of concern with the victims of crimes and the consequences to them of reporting crimes, the existence of plea bargaining between lawyers and sentence-bargaining with judges, disparity in sentences from judge to judge for what is ostensibly the same offense, and disparity and inconsistency in correctional treatment of sentenced persons. By analyzing the system as a whole and by the use of computer systems analysis models with reliable data, we may be able to assess the effects of reform in advance, suggest meaningful changes and reduce the difficulty and waste of our present trial and error methods.